Sykt Siaw Teck Hwa Realty & Developments Sdn Bhd v Malek & Joseph Au (sued as a firm)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7-23-83 OF 1989
RAHMAH HUSSAIN J
26 FEBRUARY 1999

Legal Profession *— Duty of care — Failure to appear at appeal — Whether amount to professional negligence — Legal Profession (Practice and Etiquette) Rules 1978*

The defendant had represented the plaintiff in a civil suit in the Kuantan High Court. In the suit, the court had decided against the plaintiff. As such, an appeal was made to the Federal Court. The appeal was struck off on 26 September 1983 as the defendant had failed to appear in court. The plaintiff then commenced this suit against the defendant for professional negligence.

Held, allowing the plaintiff's claim with damages to be assessed by the senior assistant registrar:

(1) The overall conduct of the defendant in the management of the Kuantan High Court case fell short of that of a prudent and/or reasonable lawyer. His failure to attend court on the date scheduled for the hearing of the appeal was a blatant non-compliance with the relevant provisions of the Legal Profession (Practice and Etiquette) Rules 1978 and a total disrespect to the Federal Court. It was unethical for him to justify his acts/ behaviour by questioning the merit of the appeal vis-a-vis the lack of prospect to succeed. He did not offer any reason for his absence in court for the appeal or whether there were intervening circumstances which prevented him from doing so (see p 591B–I).

(2) The defendant was estopped from raising the issue of having obtained the express/implicit instruction or consent of the plaintiff not to proceed with the appeal to the Federal Court as it was not pleaded in his statement of defence (see p 591E).

[Bahasa Malaysia summary

Defendan telah mewakili plaintif dalam tindakan sivil di Mahkamah Tinggi Kuantan. Di dalam tindakan tersebut, mahkamah telah memberikan keputusan yang tidak berpihak kepada plaintif. Oleh itu, rayuan telah dibuat ke Mahkamah Persekutuan. Rayuan telah diketepikan pada 26 September 1983 oleh kerana defendan telah gagal untuk hadir di mahkamah. Kemudian plaintif telah memulakan tindakan ini terhadap defendan untuk kecuaian profesional.

Diputuskan, membenarkan tuntutan plaintif dengan ganti rugi ditaksirkan oleh penolong kanan pendaftar:

(1) Kelakuan defendan pada keseluruhannya di dalam pengurusan kes di Mahkamah Tinggi Kuantan adalah di bawah tahap seorang peguam yang berhati-hati dan munasabah. Kegagalannya untuk menghadirkan diri di mahkamah pada tarikh yang dijadualkan bagi perbicaraan rayuan adalah secara jelas tidak mengikut peruntukan yang berkaitan di bawah Peraturan-Peraturan Profesion Undang-Undang (Amalan dan Etika) 1978 dan tidak menghormati Mahkamah Persekutuan. Adalah tidak beretika baginya untuk menjustifikasikan tindakannya atau kelakuannya dengan mempersoalkan merit rayuan vis-a-vis kekurangan harapan untuk menang. Beliau tidak memberikan sebarang sebab untuk ketidakhadirannya di mahkamah untuk rayuan dan sama ada terdapat keadaan yang mencelah di mana beliau dihalang daripada berbuat demikian (lihat ms 591B–I).

(2) Defendan diestop daripada menimbulkan isu mendapatkan arahan secara nyata/tersirat atau kebenaran plaintif untuk tidak meneruskan rayuan ke Mahkamah Persekutuan kerana ia tidak diplid di dalam pernyataan pembelaannya (lihat ms 591E).

Notes

For cases on duty of care, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1429–1444.

Cases referred to

Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 4 MLJ 623 (refd)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33 (refd)

Lai Cheng Chong v PP [1993] 3 MLJ 147 (refd)

Rondel v Worsley [1967] 3 All ER 993 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Legal Profession (Practice and Etiquette) Rules 1978 rr 6(a), (b), 15, 24

Legal Profession Act 1976 s 77

CW Lim (*Skrine & Co*) for the plaintiff.

Bastian Vendargo (*Sarengapani* with him) (*Vendargo & Partners*) for the defendant.

Cur Adv Vult

Rahimah Hussain J: The plaintiff's claim in this suit is for professional negligence against the defendant, a firm of Advocates & Solicitors of the High Court of Malaya, which represented him in a suit in the Kuantan High Court Civil Suit No 57 of 1981. In the said suit, the plaintiff was sued by

his sub-contractor Syarikat Than Thian Siong Sdn Bhd ('STTS') for non-payment of sums on accounts rendered. The said sub-contractor applied for summary judgment in the sum of RM105,782.50 but its application was dismissed by the learned senior assistant registrar on 16 April 1982. However, on appeal, the said decision was overturned by VC George J who held inter alia, that there was an account stated between the parties.

The plaintiff through the defendant as its solicitors appealed to the Federal Court vide Civil Appeal No 297 of 1982. The plaintiff's appeal was struck off on 26 September 1983 as the defendant was not present in court on that date. The defendant contended that the plaintiff has failed, on a balance of probabilities, to prove breach of duty as pleaded in allegedly failing to appear in the Federal Court. During the trial of this case before me, DW1 testified that the plaintiff was sufficiently advised of the unlikelihood of success of the appeal. This was further confirmed by DW2, a senior commercial practitioner who gave the same opinion on the matter.

The plaintiff however maintained throughout the trial that he had never instructed or agreed not to proceed with the appeal.

In this case there are basically two issues raised by both parties:

(1) whether there is an absolute duty upon an advocate and solicitor to appear in court; and

(2) whether the defendant obtained the express/implicit instruction or consent of the plaintiff not to proceed with the appeal to the Federal court.

Issue No (1)

It is settled law that a solicitor has a very high duty imposed upon him to his client. Lord Reid in his judgment in the case of *Rondel v Worsley* [1967] 3 All ER 993 at p 998 made the following pronouncement:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case.

This principle was subsequently followed by Richard Talalla J in the case of *Lai Cheng Chong v PP* [1993] 3 MLJ 147.

The Legal Profession (Practice and Etiquette) Rules 1978 clearly impress the importance of an advocate and solicitor's duty to appear in court.

> Rule 6:
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> (a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.
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> (b) An advocate and solicitor shall not ordinarily withdraw from an engagement once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client.
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> Rule 15:
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> An advocate and solicitor shall maintain a respectful attitude towards the Court.

A Rule 24 requires an advocate and solicitor to be ready for the day fixed for trial.

The above rules were made by the Bar Council pursuant to s 77 of the Legal Profession Act 1976 to regulate the professional practice, etiquette, conduct and discipline of advocates and solicitors. Failure to comply with
B the rules tantamounts to liability to disciplinary proceedings.

In our case the defendant did not offer any reason for his absence in court or for that matter whether there were intervening circumstances which prevented him from attending court for the appeal. There was an attempt by the defendant (DW1) to show that he had instructed one Mr Anthony Fernandes to mention on his behalf. However the defendant
C failed to produce him as a witness in court. To my mind this failure on the defendant's part leaves me no choice but to invoke s 114(g) of the Evidence Act 1950 against him.

The Supreme Court in the case of *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 upheld the trial judge's decision in
D invoking s 114(g). In that case the learned trial judge held that as there were certain persons not called to give evidence for the appellants and no reason given for the failure to do so, it was inevitable for him to invoke s 114(g) of the Evidence Act.

Issue No (2)

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I am of the opinion that the defendant is estopped from raising this issue as it was not pleaded in his statement of defence. This defence is at best an afterthought. Therefore I will not proceed to discuss this issue. In the case of *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623, it was held that:

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(1) It is trite law that parties are bound by their pleadings and are not allowed to adduce facts which they have not pleaded. However any party to a proceeding may raise other issues not pleaded in their pleading provided they make an application to amend their pleadings to include the issues to be raised.

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(2) When a party in giving his oral evidence in court deviates from his pleaded defence, then his account as narrated to the court must surely be suspect.

Thus I find that the defendant's failure to attend court on the date scheduled for the hearing of the appeal was a blatant non compliance with the relevant provision of Legal Profession (Practice and Etiquette) Rules
H 1978, not to mention a total disrespect to the Federal Court. I also find it unethical for the defendant to justify his acts/behaviour by raising the question of merit of the appeal vis-a-vis the lack of prospect to succeed. Had the defendant been properly advising the plaintiff, he would not have prepared affidavits for STTS's application for summary judgment.

I It is therefore my judgment that both on the law and the facts of this case, the overall conduct of the defendant, in the management of the Kuantan High Court case, fell short of that of a prudent and/or reasonable lawyer. As such he is liable to the plaintiff.

For the above said reasons, I allow the plaintiff's claims as prayed with damages to be assessed by the senior assistant registrar.

Plaintiff's claims allowed.

Reported by Joel Ng